

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)
)
)
 Plaintiff,)
) Criminal Action
 v.) No. 13-10200-GAO
)
 DZHOKHAR A. TSARNAEV, also)
 known as Jahar Tsarni,)
)
 Defendant.)
)

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

SEALED

MOTION HEARING

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Monday, April 13, 2015
10:04 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

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P R O C E E D I N G S

THE CLERK: All rise.

(The Court enters the courtroom at 10:04 a.m.)

THE CLERK: For a motion hearing, United States versus Dzhokhar Tsarnaev, 13-10200. Will counsel identify yourselves for the record, please.

MR. WEINREB: Good morning, your Honor. Bill Weinreb for the United States.

MR. CHAKRAVARTY: Aloke Chakravarty.

00:09 10 MS. PELLEGRINI: Good morning, your Honor. Nadine
11 Pellegrini.

MR. MELLIN: Good morning, your Honor. Steve Mellin.

MR. BRUCK: Good morning, your Honor. David Bruck for the defendant with Judy Clarke and Bill Fick.

THE COURT: Good morning.

All right. So we're going to have argument on some of the pending motions relating to evidence in the penalty phase. Let's start with the government's motion regarding evidence of the Waltham murders.

00:09 20 MR. WEINREB: Your Honor, the defendant's opposition
21 to the motion makes clear that their argument is purely a --
22 essentially a 403(b) type of argument, that it's an argument
23 that Tamerlan Tsarnaev had a propensity to commit violent
24 crimes and to rope others into committing them with him, and
25 the jury should infer from that that he is the type of person

1 who does this and that he acted in conformity with that trait
2 or that character when he -- in this case as well.

3 Putting aside for a moment the relevance of that kind
4 of argument, which as the Court knows is quite suspect and
5 problematic under the law, a condition precedent to that kind
6 of evidence every time it's ever offered is that there is
7 enough evidence for the jury to believe that the prior bad act,
8 in this case Tamerlan Tsarnaev's committing of the murders in
9 Waltham, actually happened. And that evidence is completely
00:11 10 lacking in this case. The only thing that the defense has to
11 offer is the uncross-examined and uncross-examinable statement
12 of someone who was clearly somewhat unbalanced, if not deranged
13 at the time he made it, Abraham Todashev. And I say that
14 because right after making it, as he was writing it down, he
15 attacked a Massachusetts state police officer with the intent
16 to kill him and, as the Court knows, was shot dead in the
17 course of doing that.

18 It's important to take a look at just how unreliable
19 that statement by Mr. Todashev is. He was interviewed several
00:11 20 times about Tamerlan Tsarnaev after the marathon bombings.
21 Three or four at least. In the first of those interviews he
22 never said anything about Tamerlan Tsarnaev being involved in
23 the Waltham triple homicides; in fact, he said that he and
24 Tamerlan Tsarnaev were never close, that they had had a
25 falling-out in 2010 after which they essentially stopped

1 talking.

2 It was not until agents asked Mr. Todashev about his
3 own potential involvement in the Waltham triple homicides that
4 he first implicated Tamerlan Tsarnaev in them and tried to
5 blame the whole thing on Tamerlan Tsarnaev. He did that at a
6 time when he knew that Tamerlan Tsarnaev had been implicated as
7 a murderer in the Boston Marathon bombings and, therefore, it
8 was plausible to blame the whole thing on Tamerlan Tsarnaev,
9 but he did it when he also knew that Tamerlan Tsarnaev was dead
00:12 10 and therefore could not deny his involvement in the Waltham
11 triple homicides. And before saying anything about Tamerlan
12 Tsarnaev at all, he first asked for a deal that would protect
13 him from his own liability in connection with those homicides.

14 The first time he told the story of what happened that
15 night in Waltham, he blamed the entire thing on Tamerlan
16 Tsarnaev. He said that he personally wasn't even there, that
17 he was there beforehand and that he learned about the murders
18 the next day afterwards. When the police confronted him with
19 evidence suggesting that they could prove differently, that he
00:13 20 himself, Todashev, had personally participated in the
21 homicides, he took back everything he had just said, admitted
22 that it was all a lie, and then admitted that he did, in fact,
23 participate in the homicides. But he still tried to blame
24 everything on Tamerlan Tsarnaev, saying that Tamerlan had
25 masterminded it, Tamerlan had actually committed the murders,

1 that Todashev was actually, you know, a somewhat passive
2 participant who just went along.

3 Even then his story was internally inconsistent. He
4 made statements during it which contradicted each other. When
5 they were pointed out to him, he just took them back and said
6 other things. He said things that seemed fairly, if not
7 wildly, implausible, such as that Tamerlan Tsarnaev proposed
8 the crime at a mosque during Ramadan despite the fact that
9 Tsarnaev had just become very religious. He also said that
00:14 10 Tamerlan Tsarnaev had a gun, even though we know that during
11 the marathon bombings he had to use his brother's gun and was
12 very much in search of a gun, and all of the evidence points to
13 the fact that Tamerlan Tsarnaev did not own a gun.

14 But most importantly, because Mr. Todashev is dead, he
15 can't be cross-examined about any of this. It's little
16 different than if the defense had just picked up a rumor that
17 Tamerlan Tsarnaev had participated in these murders and wanted
18 to put that in front of the jury and have them conclude on the
19 basis of all of that that Mr. Todashev actually committed
00:15 20 them -- I'm sorry -- that Tamerlan Tsarnaev committed them.

21 So the Court should exclude the evidence to begin with
22 on the grounds that even assuming that it was relevant and even
23 assuming it was not more prejudicial than probative, which I'll
24 address in a minute, that there simply is not enough evidence
25 that Tamerlan Tsarnaev actually committed these murders. The

1 only evidence again that they offer to propose is this single
2 statement by a person who gave it under circumstances
3 indicating that he had every motive to lie, to implicate
4 somebody else, to cover up his own involvement in it, and he
5 made an accusation against someone he knew was a murderer but
6 who he also knew was dead and couldn't respond to it. And he
7 then himself, immediately after giving it, engaged in an act of
8 violence that resulted in his own death and he can no longer be
9 cross-examined about it. That is about as unreliable a basis
00:16 10 for the jury to conclude that this happened as it gets.

11 The government also moves to exclude it on the grounds
12 that it is -- this type of argument in general about propensity
13 and this particular argument is prone to confusing, misleading
14 and distracting this jury. The first thing that will confuse,
15 distract and mislead them is the need for them to determine
16 whether Tamerlan Tsarnaev participated in the murders at all.
17 This is going to require them to consider in detail a great
18 deal of evidence about Mr. Todashev's credibility because if
19 the defense is permitted to put into evidence the statement of
00:16 20 Mr. Todashev, the government will be obliged to bring in all
21 the evidence it has to show that Mr. Todashev is not credible.
22 And there is a boatload of evidence. And the jury will be
23 distracted into a sideshow of trying to figure out whether
24 somebody -- whether Tamerlan Tsarnaev is guilty of some other
25 crime entirely separate from the one that they are -- they just

1 decided. They'll have to be debating or deciding the outcome
2 of a murder case that has nothing to do -- or almost nothing to
3 do with the sentencing of the defendant, which is the reason
4 they're here today.

5 And even if they conclude that based on Mr. Todashev's
6 statement there is reason to believe that Tamerlan Tsarnaev was
7 involved in the triple homicides, they're still going to have
8 to conclude that he was involved in it in the way that
9 Mr. Todashev says that he was because, for example, if
00:17 10 Mr. Todashev planned the robbery and just asked Tamerlan
11 Tsarnaev to participate and Tamerlan Tsarnaev was the one who
12 just went along and so on, then the information has zero
13 relevance. There's no propensity argument that could even be
14 made on the basis of it. And the government, therefore, will
15 be obligated to offer evidence to that effect, that there is
16 nothing to corroborate Mr. Todashev's account, at least as far
17 as the government knows, of the respective roles that he says
18 that he and Tamerlan Tsarnaev played in this.

19 So again, we will be having a mini trial on this that
00:18 20 will get involved in forensic evidence, the scope of the
21 investigation, what other witnesses have said about
22 Mr. Todashev, about Tamerlan Tsarnaev, about their relationship
23 with one another and so on.

24 Then even assuming we get past all of that, the jury
25 still has to decide what weight to give propensity of evidence.

1 And that's something they could also conceivably hear evidence
2 on.

3 And then the fourth thing they would have to do is
4 figure out what bearing all of this should have on the sentence
5 of Dzhokhar Tsarnaev, which is the reason they're here in the
6 first place. The connection between Tamerlan Tsarnaev's
7 potential involvement in a murder, the circumstances of which
8 will forever be murky and perhaps unknowable because
9 Mr. Todashev, who was the one person who confessed to actually
00:19 10 being involved in it, is dead, that is going to become part of
11 the mix of this very difficult decision that the jurors have to
12 make -- an individualized decision about the culpability of
13 this defendant, Dzhokhar Tsarnaev, for these crimes. And it's
14 simply too much of a distraction, it's too confusing, it has
15 too much of a risk of misleading them for the Court to admit it
16 given its very, very slim, if existent, probative value.

17 THE COURT: Mr. Fick?

18 MR. FICK: Thank you, your Honor.

19 On the question of reliability, I guess the first
00:20 20 thing I would say is all of the things that Mr. Weinreb just
21 said really go more to weight than to admissibility,
22 particularly in a capital sentencing proceeding where the rules
23 of evidence on this kind of thing are relaxed. And the
24 government is, I think, overstating the extent to which the
25 confession is unreliable. I mean, to hear everything the

1 government says, if those arguments could be employed, for
2 example, by a defendant whose admission is sought to be
3 admitted into evidence, then I would suspect there would be
4 many, many more excluded defendants' confessions in other cases
5 and verdicts of acquittal. Essentially, all of these things
6 are issues for the jury to decide: whether the confession is
7 reliable and why or why not.

8 The government is also, I think, overstating the
9 extent to which the confession is the only evidence of
00:20 10 Tamerlan's involvement in this murder. First of all, you have
11 the computer file that apparently Tamerlan was reading within
12 weeks of the Todashev murder -- of the Waltham murders about
13 stealing or taking or seizing the property of infidels. Within
14 a couple of weeks of that the Waltham murders happened. It's
15 characterized as a drug rip-off. And it would seem then that
16 Tamerlan has found the ideological basis for what he's about to
17 do and then goes about doing it with the assistance of his
18 friend Mr. Todashev.

19 THE COURT: You have, I presume, thoroughly looked at
00:21 20 Tamerlan's computers and his files. Is there any connection in
21 there -- any mention of Waltham?

22 MR. FICK: Any mention of Waltham?

23 THE COURT: Not necessarily by using the word
24 "Waltham," but anything to suggest he was writing about the
25 events that are suspected?

1 MR. FICK: Not that I'm aware of, writing about the
2 events either before or after in any specific way.

3 THE COURT: Are there references to Todashev?

4 MR. FICK: There's extensive communication,
5 particularly by Skype, with Todashev. Mr. Tamerlan sends back
6 and forth messages to Mr. Todashev including links to various
7 radical, one might say, jihadist images and videos on the
8 Internet, so they're certainly in communication in the years
9 surrounding all of these events about the views of radical
00:22 10 Islam, one might say.

11 THE COURT: And anything that sounds like they're
12 talking about the Waltham events?

13 MR. FICK: Not in any explicit way other than the
14 extent to which they're conferring with each other about
15 religiously motivated violence and why that may or may not be
16 justified.

17 THE COURT: How about selling marijuana?

18 MR. FICK: I don't have -- I'm not sure standing here
19 right now. It's not something that I focused on.

00:22 20 I'd also note that the government sought a search
21 warrant or search warrants -- either the government or the
22 Massachusetts authorities. I'd have to look at the warrant now
23 to recall exactly, but it was in the discovery -- for
24 Tamerlan's vehicle based on probable cause to believe he was
25 involved in the Waltham murders. And so at least at some point

1 authorities believed there was probable cause to believe that
2 that occurred.

3 And the final thing is it's a very peculiar argument
4 the government is making because they have chosen taking their
5 representations at face value to insulate themselves from all
6 of the investigation that Middlesex has done about these
7 homicides, and saying essentially, We don't know, and we don't
8 want to know, and in conjunction with that, essentially block
9 the defendant from pursuing additional investigations.

00:23 10 So we have a situation where there is a confession, a
11 confession and implication of Tamerlan Tsarnaev. The person
12 who made that confession was killed by the FBI in circumstances
13 that are, shall we say, murky and not definitively resolved?
14 And so -- and at the same time the government has chosen not to
15 learn anything about other evidence that may bear on those
16 murders. And so for all of those reasons, this is really,
17 again, a question of weight rather than admissibility. The
18 jury is capable of sorting out evidence like this, they're
19 capable of deciding what, if any, importance it deserves, and
00:24 20 this is not a reason to exclude it.

21 It's particularly odd in the context of a capital
22 proceeding because in any normal case where, say, two brothers
23 were not coconspirators or co-committers of the underlying
24 crime, part of the family history in any normal capital
25 sentencing presentation would talk about instances of violence

1 or instances of bad conduct by other members of the family,
2 instances of mental health problems by other members of the
3 family.

4 And so this kind of evidence, even if there were no
5 connection to the underlying crimes which we have here, would
6 be sort of part and parcel of the overall family history
7 picture that gets painted in a capital proceeding. And so to
8 exclude it here because it has particularly strong relevance
9 would be a peculiar result indeed.

00:24 10 And I think that essentially -- you know, what the
11 government says about the reasons why this particular species
12 of propensity evidence in general would create a sideshow, I
13 mean, any piece of evidence, depending on how the parties focus
14 on it, argue it and the importance the jury attributes to it,
15 could wind up taking on outside pieces of importance in their
16 deliberations or it may not. But, again, these are things that
17 the parties are capable of arguing and the jury is capable of
18 deciding, whereas here we have a clear -- well, we have a
19 variety of types of evidence and types of personal history that
00:25 20 we expect to put in evidence about the nature of Tamerlan
21 Tsarnaev, the outside influence he had on his brother, the
22 kinds of interpersonal violence he exercised in a variety of
23 settings to essentially coercively control other people. The
24 evidence that he committed a particularly gruesome crime by
25 sort of enlisting somebody who he had influence over is a very,

1 very -- it's an exceptionally strong piece of evidence that the
2 defense ought to be able to introduce.

3 THE COURT: How would you present the evidence? What
4 would it be?

5 MR. FICK: Well, in the first instance, we have
6 Todashev's written confession itself, and then there are
7 various investigative materials from a Florida attorney general
8 investigation which we would submit are admissible under the
9 government -- official investigation against the government
00:26 10 hearsay exception. I mean, so those would, at least in the
11 first instance, paint the picture of this is what Todashev
12 said, this is what the interaction was with law enforcement.

13 In addition to that, we have the evidence from the
14 computer about the relationship between Todashev and Tamerlan,
15 as well as the -- just weeks before this ideological document,
16 so to speak, about seizing or stealing the property of
17 infidels.

18 Whether we're able to pursue more I guess would depend
19 on the Court's rule. If the Court determines this is
00:27 20 admissible, we can certainly pursue initial third-party
21 discovery of this issue as well. It seems to me that, again,
22 we don't know what Middlesex authority's position is sitting
23 here today, but given the passage of time, the likely -- sort
24 of the weighing of their law enforcement privilege, so to
25 speak, as that exists under the law versus the need for the

1 evidence and the potential importance it has in this case, I
2 think that weighing may be different than it was early on when
3 we were seeking discovery really at the beginning of the case.
4 So there may well be forensic and other evidence in the
5 possession of Middlesex authorities which we could obtain,
6 although obviously we do not have it right now.

7 THE COURT: Okay. Go ahead.

8 MR. WEINREB: Your Honor, the government -- contrary
9 to what Mr. Fick said, the government is not questioning the
00:28 10 reliability of Mr. Todashev's confession to his own criminal
11 activity. That is a statement against interests, and I believe
12 that that alone gives that portion of it some indicia of
13 reliability. It's his attempt to shift blame onto a third
14 person that is the opposite of -- that's an indication of
15 unreliability, well acknowledged under the case law. The
16 defense cites the hearsay exception for statements against
17 interest, but normally if somebody confesses but in the course
18 of confessing they essentially try to shift all of the
19 culpability onto somebody else, that part is redacted and is
00:28 20 excised out. It's just their own confession that is admitted
21 in recognition of the fact that the blame-shifting part is the
22 opposite of reliable and it's only the self-implication part
23 that is normally deemed reliable.

24 It is not true that the government has chosen to
25 insulate itself from the Middlesex District Attorney's

1 investigation of the Waltham triple homicides. The Middlesex
2 district attorney's office has decided to insulate us from
3 their investigation. We made requests for that information.
4 They said no. They said it's a confidential investigation by a
5 sovereign that is independent of their investigation of this
6 case, and they declined to allow us to view the file or to look
7 at the evidence in that case. And that position, as far as I
8 know, has not changed.

9 There is nothing murky about the circumstances under
00:29 10 which Mr. Todashev was shot dead after confessing. It was
11 investigated thoroughly by three separate agencies who issued
12 very lengthy published reports. No need for me to repeat
13 what's in them. They speak for themselves. But I think that
14 is yet another example of the kind of sideshow that we will see
15 if this information is put before the jury during the
16 sentencing phase and will just serve to further distract them
17 from the job that they have here, which is to make an
18 individualized assessment of the defendant's character and the
19 nature of his crimes, not the character and nature of other
00:30 20 people stretching from his brother all the way through Todashev
21 to the officers who were present in the room when Mr. Todashev
22 was shot.

23 And then finally, this idea of coercive control,
24 that's just not even in the statement itself. Even
25 Mr. Todashev did not go so far in trying to shift blame onto

1 Tamerlan Tsarnaev to say that Tamerlan Tsarnaev coercively
2 controlled him nor would that have been remotely plausible.
3 Mr. Todashev, as the Court is probably aware, was an extremely
4 experienced mixed martial arts expert. He was a walking deadly
5 weapon. Shortly before he attacked the agents in his
6 apartment, he engaged in an episode of what's commonly referred
7 to as road rage where he beat someone to a bloody pulp who just
8 got into a traffic altercation with him. There's no evidence
9 that the defense can point to anywhere, including
00:31 10 Mr. Todashev's own statement, that Tamerlan Tsarnaev controlled
11 him in any way.

12 THE COURT: Go ahead.

13 MR. FICK: Just very briefly on the statement against
14 interests, again, we're, of course, operating not in a
15 strictly, you know, four corners of the rules of evidence. And
16 certainly if Tamerlan Tsarnaev were on trial, Todashev's
17 statement against interests implicating Tamerlan might be
18 excludable in the sense that -- well, because the sort of due
19 process right of Tamerlan vis-à-vis the nature and reliability
00:31 20 of the statement, that weighing would be different.

21 But what we have here is a very different situation
22 where Todashev implicates himself. And the only way that
23 implicating of himself makes any sense is to talk about what he
24 did together with Tamerlan. I mean, these people who were
25 killed, Brendan Mess and the two others, these are Tamerlan's

1 friends. There's no indication that Todashev had any
2 preexisting relationship with them. So everything about
3 Todashev's self-implication only makes sense in the context of
4 it being part of what Tamerlan did.

5 THE COURT: Let me ask about the computer information.
6 Again, with respect to the victims in Waltham, what, if
7 anything, do Tamerlan's computers have to say about that? Do
8 they show a dealing relationship, for example?

9 MR. FICK: You know, Tamerlan did not communicate a
00:32 10 lot on his computer except via Skype and so -- and that was
11 largely with either Mr. Todashev in Florida or here or people
12 up overseas. His text messages and emails are really not on
13 the computer itself. There were search warrant returns for
14 providers for those things, and you don't really see a lot of
15 interaction between him and Mr. Mess or others in the
16 electronic evidence that we have.

17 THE COURT: So I guess what I'm looking for: Is there
18 anything that you're aware of that would tend to be some kind
19 of objective corroboration for your theory about the
00:33 20 relationship of Todashev and Tamerlan?

21 MR. FICK: Well, many, many civilian witnesses,
22 including Tamerlan's wife, although whether we would call her
23 or not is a question, but there's ample sort of lay witness
24 evidence to suggest that Brendan Mess, one of the three people
25 killed, was one of Tamerlan's best friends for years, they

1 spent time together, they smoked marijuana together. There may
2 have been some sales relationship back and forth. And
3 certainly there's evidence to suggest -- or there is civilians
4 who would suggest that Mess in particular and the others were
5 sort of large-scale marijuana dealers themselves.

6 You know, exactly how we could corroborate that in
7 terms of electronic evidence, I'm not certain. That may not be
8 something that within the four corners of electronic evidence
9 is there. But there's -- certainly lay witnesses would be able
00:33 10 to establish the basic bona fides of the relationship between
11 Tamerlan and the murder victims.

12 Oh, and the other peculiar piece of behavior was --
13 and this is something that civilians have talked about --
14 Tamerlan did not attend Brendan Mess's funeral, sort of stayed
15 away, even though for years they had been considered best
16 friends. And that was something that people thought odd, that,
17 you know, there had been questions asked about why law
18 enforcement didn't think that odd and investigate Tamerlan
19 earlier. But, again, for what it's worth, that's another piece
00:34 20 of civilian testimony -- or available civilian evidence that
21 would go to Tamerlan's peculiar behavior around these homicides
22 and his relationship with those individuals.

23 And Ms. Clarke reminds me, again, I would have to go
24 back and look exactly at the call history, but there may well
25 have been some telephone calls around the time of the homicide

1 either between Tamerlan and one or more of the victims and/or
2 between Tamerlan and Todashev. But standing here right now, I
3 don't have that sort of lined up in my head.

4 THE COURT: Okay. All right. I'll reserve on it.

5 I think the next -- actually, the next one in sequence
6 on the docket is the government's motion regarding plea
7 negotiations. That's repeated in the omnibus motion. I don't
8 know whether -- why don't we address that.

9 Mr. Mellin?

00:35 10 MR. MELLIN: Thank you, your Honor.

11 Your Honor, as to that, there are actually three
12 circuits that have kind of decided and discussed this issue.
13 It's the Fourth, Sixth and Eighth Circuits have all come out
14 with either one circuit saying that this information should not
15 come in because it doesn't go to acceptance of responsibility,
16 or the Fourth Circuit went a little more restricted in saying
17 that the district court in the Caro case did not err in
18 restricting that information from coming in.

19 The basis of the argument is, your Honor, that under
00:35 20 Rule 410, plea negotiations are supposed to be kept private. I
21 mean, that is the whole point of plea negotiations and that's
22 the point of Rule 410, that the information is not supposed to
23 be used by either side later on because that would tend to
24 discourage plea negotiations and not encourage plea
25 negotiations.

1 The Sixth Circuit and Eighth Circuit went a little
2 further and said in addition to that Rule 410 issue, there's
3 the bigger issue which is that a conditional plea agreement is
4 not, in fact, evidence of acceptance of responsibility; it's
5 evidence of a defendant making a determination of whether or
6 not he wishes to roll the dice and be -- find out if the death
7 penalty is going to be imposed or whether or not he's just
8 willing to take life imprisonment in return. That does not go
9 in any way towards whether or not the defendant accepts
00:36 10 responsibility; it goes to him making a conscious decision as
11 to whether or not he's willing to run the risk of the death
12 penalty being imposed.

13 Further, the cases also discuss the issue that a
14 conditional plea is not evidence of lack of remorse. And,
15 again, it's also in line with the idea that a defendant who is
16 weighing the idea of serving life imprisonment versus being
17 exposed to the death penalty might decide to take the plea deal
18 concerning life imprisonment, but that in no way shows that the
19 defendant is accepting either responsibility or that there is
00:37 20 no -- that there is remorse by the defendant.

21 So based on those three cases, that's the basis for
22 our motion.

23 THE COURT: Okay. Mr. Bruck?

24 MR. BRUCK: Whether an offer to plead guilty and to
25 accept a sentence of life without parole goes to remorse, we

1 believe is an issue for the jury. The question of remorse is
2 raised by the government's aggravating factor of lack of
3 remorse, and it seems most unfair for the government to allege
4 the non-statutory aggravating factor that the defendant
5 demonstrated a lack of remorse and then keep out the fact that
6 he offered to plead guilty. That is especially true because of
7 the danger of the jury drawing the inference that the
8 defendant's plea of not guilty was in some sense an act of
9 defiance, or an attempt to roll the dice, or that he did not
00:38 10 concur with his lawyer's concession of guilt.

11 There are any number of speculative interpretations so
12 that the jury would wrongly draw from the course of this trial,
13 like he did it because he wanted to put the victims through the
14 experience of testifying. Of course we know that whether this
15 case had been tried purely on a sentencing -- on the issue of
16 sentence after a guilty plea, the victims would have been
17 called to testify in any event and it would not have relieved
18 them of the stress of these proceedings, but the jury doesn't
19 know that.

00:39 20 I should add that the guilty plea offer was not simply
21 an offer; it was in the course of the proceedings accompanied
22 by a written statement of remorse by the defendant in which he
23 in just three or four or five lines made very clear that he
24 recognized what he had done was terribly, terribly wrong. And
25 that was provided to the government. So to say that a bare

1 offer of a guilty plea without more does not indicate remorse,
2 doesn't really have too much to do with the facts presented by
3 this case.

4 The government cites the *Fell* case, the only federal
5 capital case, I think, for the proposition that this is not
6 relevant information, but neglects the fact that in *Fell* the
7 offer to plead guilty was put before the jury, and all that was
8 kept out was an unconsummated plea agreement in which the
9 government had drafted an agreement -- or there was a drafted
00:40 10 agreement -- to which the local U.S. Attorney at one point had
11 agreed enumerating mitigating factors that the government took
12 into account. That was not approved by the attorney general;
13 it was never consummated. Nevertheless, Mr. Fell wanted to
14 introduce that. And it was that that the Court said was too
15 far, went too far, and should not come in.

16 Rule 410, rules of evidence of course don't apply in a
17 sentencing hearing; the issue is whether the evidence outweighs
18 the prejudicial effect or the tendency to mislead or confuse
19 the issues outweighs the probative effect. And I would note
00:40 20 for this argument and for a number of others that the Federal
21 Death Penalty Act is significant in its omission of the word
22 "substantially outweighs," which is found in Rule 403. So
23 there is clearly a lower standard in the balancing that is
24 favorable to the defendant as far as the weighing process that
25 is supposed to occur in the -- under the Federal Death Penalty

1 Act.

2 In the situation where the government has
3 affirmatively raised the question of lack of remorse, we think
4 that the fact that the defendant was prepared to plead guilty
5 and that the only condition was that the government withdraw --
6 or rather, not seek the death penalty in the first instance, is
7 probative and relevant. And should we choose to do so, we
8 think we have the right to introduce that fact to the jury.

9 THE COURT: And, again, exactly what would you do?

00:41 10 MR. BRUCK: We would introduce both the offer and the
11 statement. That represents potentially separate issues and --

12 THE COURT: That's why I asked.

13 MR. BRUCK: -- of course, whether or not the statement
14 would come in might depend on what that would open the door to.
15 But at a minimum we think the offer itself should be admitted.

16 THE COURT: And the offer was -- this is in the course
17 of the DOJ capital committee proceedings?

18 MR. BRUCK: Yes. Yes. It was first made orally to
19 the government in October of 2013 at the meeting to discuss
00:42 20 authorization, and then it was then followed up in writing to
21 the government and presented to the attorney general in due
22 course before the decision to seek the death penalty was made.
23 It has been continually renewed in -- on a number of occasions,
24 even including during the progression of this trial. It has
25 never been abandoned or withdrawn.

1 THE COURT: And did the statement accompany the
2 written presentation or did that follow later?

3 MR. BRUCK: I think the letter went first, and the
4 statement followed it by a few weeks.

5 MR. MELLIN: And, your Honor, that's exactly why we
6 object to this, because they're trying to abuse and misuse plea
7 negotiations as a way to backdoor an unsworn allocution. That
8 is the point of what Mr. Bruck is now getting to. He wants to
9 bring out the plea negotiations, one, to say he was willing to
00:43 10 plead to life, but in addition, here's what he would say about
11 that. And that's why it's completely inappropriate and that's
12 why we would ask the Court to exclude it.

13 What Mr. Bruck is overlooking is as part of those plea
14 negotiations in which the defendant offered to plead guilty to
15 life, the government turned right around and said, Well, before
16 we do that, we want a chance to have a proffer of the
17 defendant, and the defendant refused. So that where there was
18 an offer to plead, we said before we do that, there's a
19 condition precedent to even going down this path, which is the
00:43 20 government having the chance to have a wide-open chance for
21 this proffer of the defendant, that did not occur.

22 So the whole point is that there is no reason to open
23 this Pandora's box. There's no harm to the defendant in not
24 having this brought out because there are three cases that
25 stand for this, and Mr. Bruck says if you look at the *Fell*

1 case, it doesn't stand for that. But there's the *Owens* case,
2 which is *Owens v. Guida* from the Sixth Circuit, which
3 specifically addresses this issue; there's the *Hall versus*
4 *Luebbers* case from the Eighth Circuit; and recently there's the
5 Fourth Circuit's opinion in *Caro* that talks about this specific
6 point.

7 There's a reason why these courts do not want this
8 information brought before a jury. It's because it opens up
9 the entire Pandora's box of what goes on behind the scenes
00:44 10 regarding plea negotiations. If they are going to bring out
11 that the defendant offered to plead guilty, then we would be
12 permitted to bring out the fact that before we even began that
13 process we asked for a proffer and the defendant refused.

14 MR. BRUCK: I have to correct the record. I know it
15 wasn't intentional, but I think Mr. Mellin has gotten all of
16 the facts and a number of different transactions mixed up, and
17 so I hadn't planned go into all of this but now clearly I must.

18 There are two separate things that have occurred
19 between the government and the defense. One was a plea offer
00:45 20 that was made, as I say initially in October of 2013. It was
21 followed up in writing to the attorney general. It included,
22 in the course of the process, the furnishing of a handwritten
23 statement by the defendant expressing remorse. That's the plea
24 offer.

25 In September of 2014, very shortly after we received a

1 Rule 16 expert notification about terrorism experts who at that
2 time intended, among other things, to testify about the
3 exploitation that had been made by the defendant -- by -- of
4 the defendant's actions, of the Boston Marathon bombing, by
5 al-Qaeda in the Arabian Peninsula, *Inspire* magazine and similar
6 AQAP publications extolling the Boston Marathon bombing and
7 urging other people to follow suit and take similar -- large,
8 similar attacks on the United States, and there was also
9 exhortations to attack Great Britain, the defense provided the
00:46 10 government with a handwritten statement in the defendant's
11 hand, from him, which did not have anything to do with the
12 guilty plea; it was rather a statement repudiating this
13 propaganda from AQAP, and it was addressed to whoever might be
14 out there saying, "Don't do this. This is not -- I do not
15 agree with this. Attacks of the sorts that are being urged
16 based on the Boston Marathon bombing would cause only more
17 suffering and pain and cannot be justified."

18 Our idea and our proposal to the government is that
19 the government ought to take advantage of this. If they were
00:47 20 actually concerned -- and we had no reason to doubt that they
21 were -- about the possible repercussions of this AQAP
22 propaganda about the Boston Marathon bombing, then perhaps the
23 government would either wish to publicize this repudiation by
24 Mr. Tsarnaev or allow the defense to do so by making public
25 this or some similar statement.

1 Now, we could not do so because of the SAMs. We are
2 not allowed to make public any statement on the part of the
3 defendant because of the terms of the special administrative
4 measures which the government imposed about four months after
5 his arrest. So all we could do and what we did do was to make
6 this available to the government.

7 We received no response whatsoever for three or four
8 months, and finally we renewed the request and said, "If you're
9 not going to use this, will you allow us to make use of it?"

00:48 10 There was no connection to plea negotiations. The government
11 responded finally -- we actually set a deadline. We were
12 considering applying to the Court for authorization to release
13 this information ourselves, not respecting -- you know, despite
14 the SAMs, and felt obviously we had to have legal authority to
15 do that.

16 The government finally wrote back and said -- and so
17 we said, "Will you please respond by," you know, "three days
18 from now?" And we did receive a letter back from the U.S.
19 Attorney which said, "We do not authorize you to release this,"
00:49 20 and set forth various reasons.

21 That -- at the same time the U.S. Attorney -- oh, I
22 should say that our original offer included -- or was followed
23 up by an offer for a clean team debrief of our client; in other
24 words, if the government would designate a walled-off person or
25 people to question our client about possible value that he

1 might be able to offer the government, to its counterterrorism
2 efforts, we would make him available to do that. We just
3 wanted to make sure that we weren't going to furnish more
4 evidence and aggravation for the death penalty phase or for any
5 phase of his trial. So we insisted that it be -- if this was
6 going to happen, it be done by a so-called clean team.

7 The government's response was that they would not
8 agree to a walled-off interrogation, that if there was to be
9 any interrogation of the defendant by the government, it had to
00:50 10 be done by the trial team and by the investigating agencies.
11 And the government's response made clear that the reason
12 that -- the focus the government had was on investigative
13 issues; in other words, who else might have been involved in
14 the marathon bombing and issues of that nature rather than the
15 questions -- the issues for which we had offered the defendant,
16 which was his potential value in counterterrorism efforts going
17 forward and countering the sort of jihadi propaganda that had
18 triggered this entire episode.

19 That is the disagreement to which I think Mr. Mellin
00:51 20 is referring. And we are reasonably certain that there was no
21 other discussion of the sort to which he has referred having to
22 do with the plea negotiation process itself. So I don't think
23 there is the danger of sort of litigating all of the various
24 other offers and counteroffers that were made because these
25 discussions did not concern the guilty pleas, were two separate

1 issues.

2 What possible relevance to the trial this second offer
3 of cooperation may have remains to be seen. We haven't yet
4 reached a judgment about that. But the guilty plea
5 effort -- the guilty plea offer is a separate quest.

6 MR. WEINREB: Your Honor, I'm sorry. If I might weigh
7 in because to the extent it's necessary to have a clear record
8 on this, things transpired before Mr. Bruck was appointed
9 counsel in this case, before Mr. Mellin joined the team. The
00:52 10 initial discussions about a potential plea offer took place
11 between me and Ms. Conrad in Beth Israel Deaconess Medical
12 Center before the defendant even had his initial appearance. I
13 asked if the defendant was willing to proffer and help the
14 government. This was in the days immediately after the bombing
15 when there was enormous concern that there might be additional
16 bombs out there, there might be additional people out there who
17 might be involved in the bombing plot, there might be
18 additional components for building a bomb available. There
19 were many, many, many things the government very badly wanted
00:53 20 to know.

21 Ms. Conrad immediately responded, "Will you take the
22 death penalty off the table?" and that began what has become a
23 series of ongoing plea negotiations, essentially, between the
24 government and the defense in which the defense has
25 persistently refused to allow the defendant to be proffered

1 except under conditions which in the government's view rendered
2 the proffer useless. The government has refused to consider a
3 plea agreement in the absence of certain consideration from the
4 defendant including a complete, honest and open proffer of the
5 type that we demand from virtually every defendant who seeks a
6 benefit for cooperation.

7 As for this very lengthy account of this offered
8 statement repudiating what was in al-Qaeda -- in one of the
9 *Inspire* magazines, I think it's -- there have been two written
00:54 10 statements offered by the defendant over the course of time.
11 One was offered in conjunction with an offer to plead guilty,
12 and it is essentially a very carefully worded statement about
13 what he has and has not repudiated, in our view in any event.
14 That is the unallocuted -- the statement that the defense now
15 proposes to introduce as part of plea negotiations that we
16 believe is totally unfair because the defendant can't be
17 cross-examined about what he really meant about it and how far
18 it goes. And that's something that is really -- has a great
19 danger of misleading and confusing the jury if they just hear
00:54 20 his carefully worded phrase without knowing exactly what it
21 meant.

22 This second thing, this offer to repudiate what was in
23 Al-Qaeda in the American Peninsula [sic] -- as we informed the
24 defense in a letter sent to them, we believe that it would not
25 in any way benefit the public safety for that to be out

1 there -- that experience had shown that when defendants who are
2 incarcerated issue statements of repudiating their terrorist
3 beliefs, that everybody in the terrorist community assumes that
4 they're being tortured or they're being coerced and it's not to
5 be believed, and it simply draws attention to them and to their
6 accomplishments and it helps them become a rallying point for
7 terrorists outside. We informed the defense of that, and
8 that's why we did not use that statement.

9 Over time there have been other attempts to have some
00:55 10 kind of sort of very, very carefully hedged offers to have the
11 defendant be proffered. We have come back and said we are not
12 going to agree to these conditional proffers where he's only
13 questioned by people who are not investigators in the case and
14 don't know the right questions to ask and don't -- are not in a
15 position to know whether he's telling the whole truth, part of
16 the truth, shading the truth, and they've never amounted to
17 anything because the defense refuses to accept the government's
18 offers and vice versa.

19 All of this will be brought before the jury if the
00:56 20 defendant is allowed to introduce evidence of his offer to
21 plead guilty. We would argue certainly not his statements.
22 Those, I think, should very clearly be excluded. And, in fact,
23 the defense has said that it's not going to seek to offer
24 statements of the defendant that is essentially an unsworn
25 allocation, which this plainly would be.

1 But the whole history of attempts to proffer the
2 defendant, of his offer to plead guilty only in exchange for
3 certain consideration that the government was not prepared to
4 give and our request for certain things from him that he was
5 not prepared to give, all of this will come out in front of the
6 jury, and we submit that in the absence of a legal requirement
7 that it be put before the jury, it is more prejudicial than
8 probative in this case. It's not relevant and it has more of a
9 likelihood of confusing and misleading the jury, distracting
00:57 10 them and wasting time than it does of helping them decide any
11 fact that is actually at issue in the case.

12 THE COURT: All right. I'll reserve that as well.

13 MR. WEINREB: I'm sorry, your Honor. I'm sorry to
14 interrupt. But before we move completely away from the
15 Todashev motion, that was a motion not just to exclude evidence
16 of the Waltham triple homicides but evidence of other prior bad
17 acts by Tamerlan Tsarnaev.

18 And the point there is the jury is going to be asked
19 to determine -- to look at the relative culpability of these
00:57 20 two defendants -- I shouldn't say "two defendants" -- of the
21 defendant and his brother for the crimes that were committed in
22 this case. But that is different from asking them either
23 explicitly or implicitly to draw a comparison between Tamerlan
24 Tsarnaev's character and the defendant's character, which is
25 not something that is appropriate for them to do in picking a

1 sentence for the defendant.

2 We are aware of certain other acts that would
3 be -- fall into the category of prior bad acts by Tamerlan
4 Tsarnaev, specifically, allegations that as far as I know were
5 never proved anywhere, that he engaged in acts of domestic
6 violence both against a former girlfriend who did, in fact,
7 file a complaint which she later dropped and did, in fact,
8 obtain a restraining order, as well as alleged acts of
9 diametric violences against his ex -- his widow, Katherine
00:58 10 Russell -- or Katherine Tsarnaev, nee Russell -- that Katherine
11 Russell herself has always consistently denied ever occurred
12 and are simply based on hearsay or rumor. They're based on
13 beliefs or the statements of girlfriends of hers who never
14 liked Tamerlan in the first place, and no charges there were
15 ever brought; there are no sworn statements about it, no
16 eyewitnesses to it, nothing like that.

17 We believe that that evidence should be excluded both
18 because it's irrelevant and because clearly the risk of it
19 misleading and confusing the jury and distracting them from the
00:59 20 task at hand outweighs any probative value that it might have.
21 And it's really hard to imagine what probative value it could
22 possibly have. It's not a propensity to do anything that's
23 relevant in this case; it's not something that the defense has
24 ever offered any evidence or even proffered that the defendant
25 knew about, and even if he did, they haven't proffered that it

1 had some effect on him like he thought he might be the victim
2 of violence by his brother or anything like that.

3 There may be other bad acts by the defendant that the
4 defense intends to offer that we don't even know about. We
5 would ask that before they be offered, that we be given notice
6 of them so that we have an opportunity to move ahead of time,
7 before they pop out of some witness's mouth on the witness
8 stand, to evaluate whether we believe they should be excluded
9 under the appropriate part of the FDPA.

01:00 10 MR. FICK: There is a wide variety of evidence that
11 Tamerlan Tsarnaev exercised coercive control over other people
12 by violence and intimidation both directly and by reputation.
13 It's hard to imagine something that could be more probative in
14 a situation where a key part of the defense is to say that
15 Tamerlan was the dominant person in the sibling relationship;
16 Tamerlan over many years exercised coercive control over his
17 brother both by violence and other means. And whether or not
18 Jahar knew about any particular instance of domestic violence
19 or other kinds of violence that Tamerlan committed, all of
01:00 20 those things tend to make the overall suggestion that Tamerlan
21 exercised coercive control over other people by violence and by
22 other forms of coercion are more likely to be true. So that's
23 sort of one category of information that's clearly central to
24 the familial relationships that are at issue here.

25 The second sort of category that -- I don't know if

1 the government considers these to be bad acts but I think are
2 particularly relevant here are various kinds of outbursts that
3 Tamerlan had in various settings, including at the mosque and
4 other places of a religious nature, of a radical jihadist
5 nature, outbursts expressing extremely -- well, outbursts
6 expressing extreme views or having extreme reactions to things
7 that an ordinary person would not react in an extreme way to.
8 All of that is probative of the nature, extent and timing of
9 Tamerlan's radicalization. He was an extraordinarily
01:01 10 opinionated, I guess one would say, person, and he sought to
11 impose his views and his views of proper behavior and his views
12 of Islam on the world, on other people in a variety of ways.
13 And to understand the relationship between Tamerlan and Jahar,
14 it's really critical for the jury to see the full picture of
15 how Tamerlan behaved in various aspects of his life.

16 MR. WEINREB: Your Honor, we believe those outbursts
17 in the mosque are essentially irrelevant, but we don't think
18 they rise to the level of being so misleading or distracting
19 that they need to be excluded, so we don't object to those.

01:02 20 THE COURT: Okay. All right. So let's move on to
21 the -- this is a defense motion regarding Dr. King's testimony.
22 Now, let me just observe that the motion was filed when it was
23 possible he was going to testify in the guilt phase as well
24 so --

25 MR. BRUCK: Yes.

1 THE COURT: -- the papers are a little bit skewed
2 towards that rather than the penalty phase.

3 MR. BRUCK: Yes. I don't think the fundamental issues
4 really are very much different.

5 There are a number of questions here. I provided the
6 background about Dr. King -- somewhat jumped the gun on this
7 motion a few days ago when we were discussing what was
8 pending -- and I won't go back over his background except to
9 remind the Court that Dr. King is an especially attractive and
01:03 10 I could even say sort of heroic figure in the history of the
11 Boston Marathon, and this is all very much intermingled with
12 his record as a United States Army airborne trauma surgeon in
13 both Iraq and Afghanistan.

14 And the government proposes to intermix those -- the
15 story of his activity and views and opinions about the injuries
16 of the Boston Marathon with his career as a trauma surgeon in
17 Iraq and Afghanistan. And we think this is bringing back the
18 betrayal-of-the-United-States factor in another form. It is an
19 attempt to sort of ramp up the patriotic them-versus-us theme
01:04 20 which -- to which this defendant is especially vulnerable as a
21 Muslim immigrant, and we think that simply the prejudicial
22 effect of all of that -- those aspects of Dr. King's testimony
23 far outweigh whatever added probative value he can bring.

24 Now, there are some legal issues here too. Most of
25 Dr. King's testimony is offered as relevant to the question of

1 grave risk of death, which is a statutory aggravating factor.
2 That factor almost invariably in the past has been proven by
3 evidence that people who were not hurt were in the zone of
4 danger. And all the case law are cases like that, where even
5 though the person wasn't injured, they could have been
6 seriously injured or killed. A shot is fired and there are
7 several people around and there were people that were not hit
8 but could have been. That's what this -- that is the core
9 conduct.

01:05 10 The aggravating factor, as I pointed out a few days
11 ago when we started to talk about some of these issues,
12 is -- focuses on the defendant's intent, his intent to cause a
13 grave risk of death or his intentional action that caused a
14 grave risk of death to others rather than the effect of the
15 action. And what the government has really done here is to
16 create a new aggravating factor which is not grave risk of
17 death.

18 Let me be more precise about that. The aggravating
19 factor alleged is, and I quote -- this is Number 4 from the
01:06 20 Notice of Intent to Seek the Death Penalty. "Dzhokhar Tsarnaev
21 intentionally and specifically engaged in acts of violence
22 knowing that the acts created a grave risk of death to a person
23 or persons other than one of the participants in the events
24 such that the participation in the acts constituted a reckless
25 disregard for human life and that the murder victims died as a

1 result." The focus is on his reckless disregard, "and the
2 deaths of the murder victims," not on the injuries that were
3 committed to the other victims.

4 And so this cuts fairly widely for Dr. King to -- and
5 for some of the other evidence that the government wants to
6 introduce at the penalty phase from people who were grievously
7 injured but not killed, and to justify it all as
8 grave-risk-of-death evidence does not speak to the actual
9 aggravating factor that's been alleged.

01:07 10 Now, I don't know and have had no occasion to research
11 whether or not the government could have alleged as a
12 non-statutory aggravating factor that had these -- you know,
13 that the capital crime charged -- not other crimes but the
14 capital crimes charged -- also caused grievous injuries to
15 other -- to other people who did not die. But they didn't
16 allege that. And the government is strictly bound by the
17 notice that they have filed. They can't amend it without good
18 cause, and they certainly can't amend it now.

19 So to justify Dr. King's very -- what we expect to
01:07 20 be -- we don't have a report, but we expect his testimony to be
21 extremely graphic testimony linking IED damage that he saw
22 overseas treating American troops to the damage to the
23 victims -- the injuries to the victims of the Boston Marathon
24 bombing. To try to get that into evidence on the grounds that
25 it proves the grave-risk-of-death aggravating factor is both

1 legally meritless and risks really inflaming the jury past the
2 point that they already have been in this case. And simply
3 laying on more pain and more horror and more sense of
4 identification -- completely understandable identification with
5 the surviving victims in this case as a reason to impose the
6 death penalty, underlying all of this -- and this is the thing
7 of which we must never lose sight, is that the jury does not
8 sentence for the non-capital injuries. Those are crimes, had
9 they been separately charged, that the Court would sentence
01:09 10 for.

11 But to put these injuries before the jury both in the
12 form of one victim after another, and of Dr. King describing in
13 graphic -- what I assume to be the most graphic detail what the
14 non-fatal injuries looked like, is to push the jury's ability
15 to keep clear what they have sentencing authority for and what
16 they don't way past the breaking point. And it guarantees in
17 my view, in our view, that the jury will impose sentence partly
18 for the injuries that were done to the people who lost limbs
19 and who received other terrible injuries.

01:09 20 These people have a right to be heard and the injuries
21 that they suffered have a right to be considered, but the time
22 for that is the sentencing before the Court, not before the
23 jury whose sentencing authority is limited to the four
24 homicides that, of course, are charged various ways. But
25 that's it. That's what the jury does. And I think it's

1 terribly important that the -- both with respect to Dr. King
2 and across the board the Court segregate that issue out so that
3 the jury isn't overwhelmed with this highly emotional evidence.

4 So we have a whole mix of factors regarding Dr. King.
5 There are some very specific things that the government intends
6 to get from Dr. King, such as that Martin Richard was
7 especially vulnerable. That's already in.

8 Dr. King did not see any of the homicide victims,
9 including Martin Richard. He treated victims who survived and
01:11 10 went to Mass. General. He was not involved in any of the
11 autopsies; he didn't see any of the autopsies. The doctors who
12 actually conducted the autopsies have already testified.

13 If the forensic pathologist who has already testified
14 regarding the Richard child -- if the government feels that he
15 did not make clear enough that Martin Richard was especially
16 vulnerable, of course he could be re-called. He testified
17 about the loss of blood, that a small child would lose his
18 blood more rapidly. And the evidence of particular
19 vulnerability is already there.

01:11 20 It is not necessary to call this veteran of Iraq and
21 Afghanistan to describe what IED wounds do, to bring all of
22 those powerful but extraneous emotional issues into this case
23 simply to have him say what any doctor could, is that a child
24 is more likely to be hit by more shrapnel because he's closer
25 to the ground, that he has less blood in his body. That

1 is -- I think that is a sort of make wait reason, additional
2 reason, for calling Dr. King when that's not any part of the
3 actual reason.

4 I said at the beginning that we remain extremely
5 concerned about the potential -- about what is becoming -- what
6 we think is almost the impossibility of the jury abiding by the
7 non-discrimination requirement of the Federal Death Penalty
8 Act. And when Mr. Chakravarty's closing argument ended with
9 the juxtaposition of this nasheed over a fast photo -- a photo
01:13 10 montage of the carnage on Boylston Street, we really had a
11 moment in which the uttering of this defendant, the emphasis on
12 his foreignness, on the strangeness of his religion and of his
13 religious beliefs, in addition to everything else in evidence,
14 had really gone too far.

15 And now to add this, to bring in the United States
16 Army, a man who also, while he was at it, ran the marathon that
17 day before going to his post as a trauma surgeon at Mass.
18 General, and just to try to present this idea of this is the
19 heroism of the American military. Here is a man who saw the
01:13 20 way our soldiers have been afflicted -- the government actually
21 went so far in their papers as to say the one thing he can do
22 is to say that these injuries -- that this defendant had made
23 statements, the boat writing which extolled the actions, the
24 attacks by Muslim extremists on our troops, or words to that
25 effect, and here is a witness who can say that these are the

1 sorts of injuries inflicted by Muslim extremists in Iraq.

2 Now, there was nothing in the boat specifically about
3 Iraq. It's the government's conclusion that that is what he
4 was referring to when the writings referred to "killing our
5 innocent civilians" and so forth, but the government's papers
6 really close this circle and make it very, very clear that
7 there is simply no way to avoid the conclusion that bringing
8 Dr. King into this mix where there's no need for his testimony
9 on any issue pointing towards -- for the most part toward a
01:15 10 statutory factor that doesn't fit is really simply an effort to
11 inject prejudice and bias into the sentencing proceeding.

12 We think it would violate the Eighth Amendment to go
13 down this road, but much more immediately, I think it is a
14 clear example of where the Court should exercise its
15 gatekeeping function under the Federal Death Penalty Act
16 because this evidence has far more prejudicial effect than
17 probative value.

18 MS. PELLEGRINI: Your Honor, if I may, I think we
19 should start off first by correcting the record with respect to
01:15 20 the government's notice. The factor that Mr. Bruck was
21 concentrating on, Number 4, is an intent threshold factor. And
22 the government specifically quoted the statute at 18 U.S.C.
23 3591(a)(2)(D). That includes the language that we put in
24 there, that it created a grave risk of death to a person or
25 persons. Yes, it focuses on intent, and specifically engaged,

1 because that is an intentional factor, and then adds the part
2 about the acts constituted a reckless disregard for human life.

3 The statutory aggravator that the government is
4 relying upon under 18 U.S.C. 3592(c)(5) is actually the correct
5 one and sets forth the specific parameters of what will be
6 Dr. King's testimony, that the defendant knowingly created a
7 grave risk of death to one or more persons in addition -- in
8 addition -- to the victim of the offense in the commission of
9 the offense. So it obviously contemplates that there were
01:16 10 persons other than the victims, and that has always been the
11 government's stance on that.

12 To the extent that Dr. King's testimony will provide
13 information about the grave risk of death, the fact of the
14 matter is his military experience simply isn't just intertwined
15 with his testimony; it actually forms the basis for his
16 knowledge and his being able to give the opinion. Unlike a
17 medical examiner, although they are extraordinarily well
18 trained and experienced in what they do, their field is
19 forensic pathology. In Dr. King's case, as a trauma surgeon,
01:17 20 it was his responsibility and job, and continues to be so, that
21 he is treating the person while still alive and continues that
22 treatment throughout the course of their recuperation and
23 rehabilitation, so that he is acutely aware of all of the
24 factors that, in fact, form a grave risk of death: the risk of
25 going under anesthesia for multiple operations, the risk of

1 infection, all the things that he has already opined upon.
2 Whether or not there's an airway blockage or thoracic injury,
3 whether there's blunt, abdominal trauma, whether there's
4 penetrating chest trauma, what one does for massive
5 gastrointestinal bleeding. These are all to keep people alive,
6 so he understands the response of the human body to the
7 injuries that have occurred by the use of an IED.

8 If you'll recall, your Honor, Jessica Kensky took the
9 stand and indicated that one of the problems and one of the
01:18 10 reasons that she was now being treated at Walter Reed Hospital
11 was that there weren't very many people in the medical
12 profession here in the Boston area who understood the nature of
13 her injuries and what she needed in order to recuperate.

14 That is true. But Dr. King is one of the few who has
15 that experience. He has -- unlike a regular, if there is such
16 a thing, emergency-room trauma surgeon, seen one or two victims
17 who may have been involved in a blast injury or in a fire so
18 that there are thermal injuries, he has literally seen
19 thousands. And he has spoken to these people before he has
01:18 20 treated them; he has spoken to them while he's treating them.

21 So he not only understands the nature of the grave risk of
22 death to their bodies, but he also understands the level of
23 pain which relates to the cruel, heinous and depraved
24 aggravating factor that the government also intends to put in
25 through Dr. King because of his familiarity with what is needed

1 in order to have the person be released from that pain.

2 He is able, as only one could do with a live person,
3 to gauge the level -- and he would say that it would be a
4 profound level -- of medication in order to relieve the pain,
5 and he also understands because of his work, where the pain is
6 felt, how it is felt, and what medical steps can be taken to
7 alleviate that.

8 With respect to Martin Richard, the government does
9 expect to be able to call Dr. King with relation to the
01:19 10 particularly vulnerable aspect of Martin. Yes, we did not
11 enlarge upon it because the medical examiner's testimony was
12 just that. What did he see in the course of the autopsy.
13 However, Dr. King, again because of his particularized
14 evidence -- and we can't help it, your Honor. He's a
15 40-year-old man who's an athlete and currently a lieutenant
16 colonel in the United States Army. This is his background, and
17 this is who he is. He would be the last person to tell you
18 that he was a hero, because in his view he was simply doing his
19 job that day.

01:20 20 But with respect to Martin Richard -- going back to
21 that, he is particularly able to tell the jury about how death
22 occurs or how it could occur particularly with these types of
23 injuries because he's seen it, he's stopped it, and in some
24 cases he hasn't been able to stop it, but he's able to say why
25 the injury occurred in the manner that it occurred, what

1 occurred as a result of that, and the fact that Martin was of
2 small stature and how the blood loss -- but also be able to
3 talk about how a person's body reacts to that sort of stress
4 and what happens when a person is, in fact, in the throes of
5 dying.

6 So for all of those reasons, his testimony is
7 extraordinarily relevant and very important to the government.
8 It's limited to those aggravating factors that we have noticed.
9 His CV has been provided. And it has nothing to do with where
01:21 10 the defendant comes from or his national origin or anything of
11 that nature. It just happens to be that that's where IEDs are
12 exploded most often, and that's where Dr. King's knowledge base
13 comes from.

14 MR. BRUCK: I do stand corrected. I had read the
15 wrong aggravator, but the argument is identical. The grave
16 risk of death statutory eligibility factor, which is
17 3592(c)(5), is materially exactly the same as the threshold
18 factor that I read to you, which was that the defendant
19 knowingly created a grave risk of death to one or more person
01:21 20 in addition to the victims of the offense. The focus, again,
21 is the knowing creation of a grave risk of death; not on the
22 consequences.

23 The government has established in spades that
24 exploding a bomb, which actually killed two people in one
25 instance and another one in the other, in a crowd establishes a

1 grave risk of death to other people. That is not something
2 which has to be proven over and over again by exploring the
3 actual sequelae for each of the people that was injured. As I
4 say, that proves another aggravating factor and one that the
5 government has failed to allege.

6 The government now says, Well, okay. So it proves the
7 heinous, atrocious -- the heinous, cruel and depraved manner of
8 committing the offense, but the problem with that argument is
9 that it does not comport with the terms of the statutory
01:23 10 aggravating factor, which is that the defendant committed the
11 offense in a especially heinous, cruel and depraved manner in
12 that it involved serious physical abuse to the victim. And
13 what is meant by "victim" is the victim of the capital count,
14 that is to say, the decedent. That is the focus.

15 This has been the most constitutionally problematic
16 statutory aggravating factor in all of death penalty law for
17 the last 35 years because of its inherent vagueness and
18 susceptibility to being applied to every murder case. And
19 there are a number of U.S. Supreme Court decisions reversing
01:23 20 death sentences where the jury could have used this aggravating
21 factor to sentence anybody to death for any murder.

22 The way that the Federal Death Penalty Act controls
23 that is by specifying very specific facts that must be proven
24 as a predicate for a finding of this aggravating factor, and it
25 is in this case limited to serious physical abuse and it is

1 limited to the victim. The victim of the murder. So it simply
2 doesn't help the government to say that there's that other
3 aggravating factor that they can hang all of this very, very
4 emotionally overwhelmingly powerful evidence on because it's
5 not relevant to that factor either.

6 For all those reasons, we think that Dr. King's
7 testimony should be excluded and that the government's proof
8 concerning non-homicidal offenses generally -- non-homicide
9 injuries generally should be limited accordingly.

01:24 10 MS. PELLEGRINI: Your Honor, if I just may briefly
11 respond to that. Directing the Court to Sand's on the federal
12 jury instructions, and specifically Instruction 9A-10 on the
13 grave risk of death relating to the definition provided therein
14 about the significant and considerable possibility that another
15 person might be killed. So obviously, it could not include the
16 victims.

17 With respect to the heinous, cruel and depraved, the
18 government's testimony with respect to Dr. King will relate to
19 the victims. He has, in fact, reviewed all of the autopsy
01:25 20 reports.

21 THE COURT: All right. Let's move to the omnibus
22 motion. Let's take the issues one at a time, I guess.

23 So I think the defense in the response took some of
24 them off the table, explicitly the reasonable doubt standard
25 for the weighing. I think the defendant preserves his point of

1 view but acknowledges that the law of the circuit is otherwise.
2 I'm just tracking through the response to get the issues, I
3 guess. So the evidence about -- or argument about the
4 Massachusetts lack of a death penalty is a state law matter.

5 MR. MELLIN: I think that one is still in play, your
6 Honor. And we would rely on the cases we cite, and in
7 particular, the Sixth Circuit's en banc decision in *Gabrion*
8 which lays out that there is a reason why this is not an
9 appropriate mitigating factor. It's because it has nothing to
01:26 10 do with the defendant's character, the defendant's history or
11 the circumstances of the offense.

12 Whether it's the Commonwealth of Massachusetts or the
13 State of Maryland or the country of France, it doesn't matter
14 in the cases that *Gabrion* talks about what the actual
15 diplomatic or political decision was made by that governing
16 body; what's important is the evidence about whether or not the
17 defendant has put on mitigating factors that deal with his
18 background, his character or the circumstances of the offense.
19 So I think it's very clear, especially in the most recent
01:27 20 opinion of the Sixth Circuit.

21 MR. BRUCK: I think we can rest on our papers on this
22 issue. The Court has already advised the jury that
23 Massachusetts law does not provide the death penalty, so this
24 is not a secret. This was done during your introductory
25 instructions, as the Court recalls, to each panel during voir

1 dire.

2 We are not asking to introduce evidence on the issue.
3 The issue is already known to the jury. We do think that
4 whether or not the requirements of justice in this particular
5 case, given the harm to this particular community, which I know
6 the government is going to probably have things to say during
7 argument from its side, can take into account the fact that
8 this punishment is not something which the people of
9 Massachusetts are used to, feel that it's part of their arsenal
01:28 10 against -- or something which historically has felt to be
11 necessary in this Commonwealth. And looking to, in a holistic
12 manner, as to what is fair and just and necessary in this case,
13 I think that is something that can't be off limits. But as I
14 say, we have authority in our brief that we've cited and we
15 rest on that.

16 THE COURT: All right. We've dealt with the plea
17 issue. The next is the -- I guess it's the -- this is the last
18 one, Number 7, on the -- in the notice letter of December 12th
19 which is the circumstances -- under the circumstances executing
01:29 20 the defendant would increase rather than reduce the danger of
21 future terrorist attacks.

22 MR. BRUCK: I might be able to clarify this issue just
23 a little bit.

24 THE COURT: Okay.

25 MR. BRUCK: That statement about the -- sort of the

1 actual prediction that there would be more murders rather than
2 fewer murders came at the end of Dr. Scott Atran's Rule 16
3 expert disclosure. It was a way of expressing conclusions that
4 could be drawn from opinions that Dr. Atran will give which are
5 largely responsive to those of Dr. Levitt. And really, this is
6 an expert who has tremendous one-on-one firsthand face-to-face
7 experience interviewing, evaluating, actually administering
8 psychological testing to terrorists, to people who have been
9 involved in religiously motivated acts of violence all around
01:30 10 the world. And he is one of the foremost researchers on the
11 whole question of radicalization and what actually moves people
12 who hold radical views to take violent action. And contrary to
13 Dr. Levitt, he will talk about the role of interpersonal
14 relationships, and in a more general way will discuss what it
15 is that moves people to action.

16 It will be inferential -- it could be inferred from
17 his testimony that -- and indeed it's inferrible from just
18 plain old common sense that the death penalty is a problematic
19 response to a very specific form of crime which happens to be
01:31 20 involved in this case, which is religiously motivated violence
21 by people who seek martyrdom, who seek death, who are actually
22 members of what one could describe as a death cult. And there
23 will be evidence presented from Tamerlan Tsarnaev's computer
24 that that describes him to a tee.

25 The government has introduced evidence claiming that

1 in effect it also describes the defendant. I envy my brother.
2 There is no getting out of this case the logical proposition
3 that one would wonder about the utility of threatening or
4 punishing with death people who commit a crime in order to die.
5 So there's no way of disentangling that from the case. The
6 government has joined the issue in various ways.

7 In closing argument, the government made the point
8 about how the defendant was doing what terrorists do. He
9 wanted his acts to stand for more than what people might think.
01:32 10 There was a long discussion of messaging, of the effect on
11 other people that the defendant wanted to have. There is just
12 no way of unscrambling the egg.

13 And so we're not asking -- and I think maybe the
14 government was responding to something which maybe is not
15 really an issue in the case which is why I asked to speak out
16 of turn here. We are not actually making an empirical
17 prediction that there will be more terrorist attacks rather
18 than fewer if the defendant is sentenced to death and executed;
19 rather, it is -- Dr. Atran's testimony will simply deal with an
01:32 20 area in which this question arises, as it already has arisen
21 and must inevitably arise, from all of the evidence that the
22 government has introduced in the case.

23 And all we're saying in responding to their motion --
24 and maybe we don't have to say it -- is that there is no way to
25 elide this question from the evidence, from the jury's

1 consideration or from closing argument. It is part and parcel
2 of every case of this nature, and it would be very unfair and
3 illogical for the government, in effect, to get a free pass on
4 what is an issue that will be on everybody's minds, and should
5 be, because it arises from the individual facts of this case.

6 This is not a categorical argument that the death
7 penalty should never be imposed for terrorism. It has to do
8 with the facts that have been introduced primarily by the
9 government, so far, in this case, and that will also be
01:33 10 explored by us, particularly when we look finally at the
11 motivations of Tamerlan Tsarnaev. And so that's what this is
12 all about, and I'm not sure that there's really a live
13 controversy.

14 MR. MELLIN: Well, your Honor, there's a live
15 controversy if the defense is asking for this mitigator. I'm
16 not exactly sure what Mr. Bruck is saying right now, but if
17 they are asking that this mitigator be put before this jury, we
18 would ask that it be excluded. It's not appropriate.
19 Mr. Bruck's argument to the Court is about some legislative
01:34 20 impact or legislative concerns that may go on in deciding
21 whether or not a political body wishes to have the death
22 penalty, but that's not an issue for this jury.

23 The issue for this jury is to look at all of the
24 evidence that deals with the defendant's character, his history
25 and the circumstances of the offense, and decide what is the

1 appropriate punishment in this case, not what some hypothetical
2 third party may do or may not do.

3 Mr. Bruck just said that he would not be able to put
4 on empirical evidence that there would be an increase in
5 attacks. That takes care of this mitigator. They don't have a
6 basis to claim this mitigator. Just because Dr. Atran at the
7 end of some disclosure says this doesn't make it appropriate.
8 We would move to exclude it. If they are going to call
9 Dr. Atran to testify, we would move to exclude that statement
01:35 10 from his testimony because there's no basis for it and it's not
11 appropriate for him to make it. It's completely speculative
12 and has nothing to do with the defendant's sentencing.

13 And just one other point, your Honor, concerning
14 Dr. Levitt's testimony. At no point did Dr. Levitt say
15 anything about the impact that sentencing the defendant to
16 death would have on the actions of others. That is not at all
17 what Dr. Levitt said. We will have no evidence that will claim
18 that in our case-in-chief. And the actual aggravating factor
19 that we have alleged says, "In conjunction with committing acts
01:35 20 of violence and terrorism, the defendant made statements
21 suggesting that others would be justified in committing
22 additional acts of violence."

23 That has to do with the defendant's statements in the
24 boat. What he wrote in the boat. That is what that is
25 referring to, his actions in this case, and also his statements

1 in the boat. That is it. We're not talking about anything
2 anyone else is saying. We're talking about what the defendant
3 intended and what the defendant wrote; not anything at all
4 about actions of third parties not involved in this case.

5 MR. BRUCK: I should just say that the government's
6 motion to which we were responding was to bar evidence and
7 argument; it was not a motion to strike the mitigating factor.
8 If there is a way of redrafting the mitigating factor to make
9 it more responsive to what we intend to prove we can certainly
01:36 10 do that, but we're not prepared to argue the striking of the
11 mitigating factor in response to an argument which was actually
12 addressed at evidence and argument, not at the factor itself.

13 THE COURT: Well, that conveniently brings me to
14 another topic, and that is when we might have a final statement
15 of mitigation factors and aggravating factors in the form that
16 they would be put to the jury in the verdict slip. I think we
17 should have that before openings. So to the extent that these
18 do or do not match that criterion, I would like to include that
19 in whatever is proposed from the parties regarding what should
01:37 20 be said to the jury in the opening statements so it's clear
21 from the outset what the template is and there's no argument
22 later about things coming in that weren't identified to the
23 jury at the outset.

24 Which brings me to my other question from everybody,
25 is when we might have witness and exhibit lists sufficient to

1 be advised prior to the instruction -- the preliminary
2 instructions. And for that I would suggest I don't think
3 there's any reason to stagger it. I would say both sides by
4 the end of the -- by the close of business on Thursday, if I
5 could have an expected witness and exhibit list for this phase.

6 And if possible, because I invariably referred to it
7 in terms of the aggravating and mitigating factors that will be
8 put to them, I don't know if you have prepared a proposed
9 verdict slip, but that would be useful. That can be adjusted,
01:38 10 I think, as we go along, depending on what happens in the
11 course of the case. But I am particularly interested in the
12 statement of those propositions, aggravating and mitigating,
13 that will be the focus of the jury's attention when they
14 finally deliberate.

15 So I guess we could make the same deadline, the end of
16 the day Thursday, for that.

17 MR. WEINREB: Your Honor, that's fine by the
18 government.

19 I'd just like to add, we intend to file a motion in
01:39 20 limine by close of business today related to some of the expert
21 testimony that the defense proposes to introduce in the penalty
22 phase with one exception -- or two exceptions, I should say,
23 and that's with respect to Mr. Spencer, who is the computer
24 expert, and Mr. Grant, the cell phone extraction expert.

25 The defense has provided the government as evidence

1 that it intends to offer at trial 18 gigabytes of information
2 from Tamerlan Tsarnaev's computer and 16 devices, mostly cell
3 phones. And as far as -- it has really not been narrowed down
4 beyond that, so that we have no idea which of these items the
5 defense actually intends to put in. And we're assuming, unless
6 we hear to the contrary, all of them.

7 That is, in our view, on its face an offer of evidence
8 that is both irrelevant and more prejudicial than probative in
9 the sense that just a cursory glance at some of this material
01:40 10 makes clear that it has little or nothing to do with this case.
11 Innumerable photographs of the Tamerlan Tsarnaev with other
12 people who have never been identified and probably never will
13 be, photos of things that appear to have absolutely nothing to
14 do with this case, thousands and thousands of files that have
15 nothing to do with this case, Katherine Tsarnaev's entire
16 Internet search history with tens of thousands of entries in
17 it, I mean, just all sorts of things that are plainly on their
18 face irrelevant and likely to mislead and distract the jury.
19 The same thing with all of these devices.

01:40 20 The defendant, as the proponent of this evidence, has
21 the burden of showing that it is relevant and noncumulative.
22 We assume that when it comes down to it, the defense is only
23 going to be offering a small portion of this evidence. But
24 until we see each item, item by item, we can't say whether it's
25 relevant; whether we believe that it's more prejudicial than

1 probative; we can't assess whether it has been altered, meaning
2 stripped, for example, of metadata that could help put it in
3 context for the jury by informing us and them when it was
4 created on particular devices; and whether it was deleted, in
5 other words, whether it comes from someplace in the file
6 structure or whether it comes from so-called CART space or it
7 may have been deleted for days, weeks, even years. We have
8 reason to believe that some of the images that they have all
9 sort of noticed as potential exhibits are images that were
01:41 10 converted into PDF files for purposes of presentation. That
11 strips them of their metadata.

12 So before we can craft a motion in limine with respect
13 to any of those items, we need an itemization of them. And it
14 sounds like we potentially will get one on Thursday. We will
15 then quickly endeavor to review them and file something. But I
16 just want the Court to know that there's no possible way we
17 could do it before Thursday -- or really before having that
18 list and taking some time to review it.

19 THE COURT: Well, let me just note on our schedule the
01:42 20 defense case will begin the 27th, so there will be some time to
21 assess those things.

22 MR. WEINREB: And then in addition, we know, as the
23 Court does too, that the defense intends to call various
24 witnesses from the Bureau of Prisons as well as potentially an
25 expert, a former employee of the Bureau of Prisons, to talk

1 about, it appears, the capacity of the Bureau of Prisons to
2 incapacitate defendants of all nature to the point where they
3 are not capable of doing harm to others within the institution
4 or outside of the institution.

5 As the Court may be aware, there is a great deal of
6 case law that rejects that as relevant mitigating evidence
7 because, again, it doesn't have to do with the character of the
8 defendant or the nature of this crime; it simply has to do with
9 essentially a policy matter of whether the death penalty is
01:43 10 needed at all given the capacity of the Bureau of Prisons to
11 incapacitate people. It's true with respect to every
12 defendant. There's nothing individualized about it with
13 respect to this defendant.

14 Whether or not we seek to exclude that evidence as
15 being essentially categorical evidence, not individualized to
16 this defendant, depends in part on whether the defense, by
17 offering it, is -- it's proposing to open the door to a robust
18 examination of what it really means to spend your life in
19 prison. We're not actually opposed to that. We're not opposed
01:44 20 to it in part because the jury seems to have exhibited a lot of
21 curiosity about it during voir dire, and we understand why the
22 defense might want the jury to feel secure that the defendant,
23 if he is incarcerated for the rest of his life, will not pose a
24 threat or a danger to others. But by the same token, the jury
25 should not be given a one-sided presentation; in other words,

1 they should not be fooled into thinking that prison is one
2 thing when it's really another thing. They should have the
3 whole picture.

4 And so I guess what I'm asking here is really for the
5 Court to inquire of the defense whether that is what they are
6 proposing, is a sort of complete examination of what it will
7 mean for this defendant if he is sentenced to life
8 imprisonment, or whether they intend to try to narrowly put on
9 evidence solely of something that they think will make the jury
01:45 10 believe that life imprisonment is one thing when the
11 government, through cross-examination and rebuttal testimony,
12 could offer what we believe to be a complete picture of what
13 that will be. And that will determine for us whether we seek
14 to exclude this evidence as being impermissible categorical
15 evidence or not.

16 MR. BRUCK: Well, we're a little bit hamstrung by the
17 fact that although we subpoenaed a government witness to
18 describe conditions -- or at least the security circumstances
19 surrounding where the defendant will be housed if he receives a
01:45 20 life sentence back in January, we just in the last few days
21 have been told that we are going to have substitute witnesses
22 from the government provided instead of the witness we seek,
23 and we now have a conference call with the substitute witnesses
24 arranged for Wednesday with the government counsel
25 participating.

1 So what our evidence is, given that sequence of
2 events, is a little bit difficult to predict, but I can inform
3 the Court that all we seek to do is to show what measures are
4 in effect to keep the defendant from communicating or for -- or
5 from posing a risk of violence or of threatening national
6 security while serving a life sentence.

7 We are not seeking a thorough-going exploration of
8 every condition or circumstance under which he will be held for
9 the rest of his life. We want to show what the cells look like
01:46 10 that he'll be held in, we want to show what the day-to-day
11 security arrangements are, and above all, the restrictions on
12 communication. And we also want to show that the authority to
13 leave those conditions in place rest with the government, with
14 the Department of Justice, including the United States
15 Attorney's Office for the District of Massachusetts, so the
16 government [sic] will not think that the defendant goes into a
17 bureaucracy and none of these folks have anything to do with
18 restrictions that he will be under in the future.

19 That's fairly limited and that's what we want to
01:47 20 prove. Whether there are higher levels of violence or whether
21 there are different sorts of conditions in prisons where he
22 will never go because of the classification that he is
23 extremely likely to be held under for the foreseeable future or
24 possibly even forever is not relevant and should not come in,
25 but we are narrowly focused on the ways that the government

1 will be able to ensure public safety and to protect national
2 security even if he is allowed to live in the Federal Bureau of
3 Prisons.

4 And that's it. And I don't think that this -- we do
5 not intend to try everything about the Federal Bureau of
6 Prisons from soup to nuts, and I don't think the government
7 should be allowed to show that they also have minimum security
8 camps where people have all sorts of privileges that
9 Mr. Tsarnaev will never come within a country mile of should he
01:48 10 be sentenced to life in prison.

11 I think we can and should cabin this quite narrowly.
12 But it is an important issue. The jury is right to worry about
13 it given the havoc that this crime undeniably caused.

14 MR. WEINREB: So, your Honor, obviously we don't
15 intend to put on evidence all about the entire Bureau of
16 Prisons, including statements that don't have any potential
17 relationship to the defendant in this case, but we would intend
18 to offer evidence of things that do potentially relate to the
19 defendant's likely course of incarceration through his lifetime
01:49 20 in the Bureau of Prisons. And for everything that we seek to
21 offer, we'll have some kind of foundational evidentiary basis
22 for it.

23 There will be an expert, or someone from the Bureau of
24 Prisons or somebody, who will -- obviously we're not going to
25 put on evidence about a minimum-security work camp somewhere if

1 nobody's going to say there's any realistic possibility the
2 defendant will be there, but there may be something other than
3 an entire lifetime spent in the highest level of super max in
4 Florence, Colorado, that the defendant can look forward to.

5 In addition, the SAMs process, which is what the
6 defense is referring to when they talk about control over the
7 defendant's communications, it would of course be inaccurate to
8 suggest to the jury that that is simply something that the
9 government, including the U.S. Attorney's Office, manipulates
01:50 10 at will and can keep in place for somebody's entire lifetime.
11 As the Court I'm sure is aware, the government cannot do that.
12 There's judicial review of it. SAMs have been removed over
13 time. The government sometimes loses SAMs litigation. And all
14 of that is something that the jury should be aware of.

15 So I know that the defense naturally would like to
16 focus very narrowly on all the restrictions that will be on the
17 defendant. My whole point is that those normally would be
18 excluded as being evidence not relevant to his character or to
19 the nature of the crime or to his criminal history. They are
01:51 20 about the ability of the Bureau of Prisons as a whole to manage
21 its population. We would only not be objecting to it, not
22 seeking to exclude it, if the jury is given a complete, full
23 picture of just how restrictive the defendant's incarceration
24 is likely to be realistically over the history of his time
25 there and what the conditions of that confinement will be like.

1 So I think because we're talking about it somewhat in
2 the abstract, I'm not sure it's possible to be clearer than
3 that, but I believe the parties' positions are clear. We will,
4 I guess, make the motion to exclude it, and in the alternative,
5 if the Court does not exclude it, seek permission to put on
6 a -- to robustly cross-examine and rebut testimony in the
7 nature -- in the manner that I have stated, and we'll leave it
8 at that. If the defense wants to oppose our right to do that,
9 then I think they should make clear exactly what limits they're
01:52 10 seeking to put other than irrelevant material, which is all
11 that I heard Mr. Bruck say just now.

12 THE COURT: Well, to the extent that it's the
13 alternative outcome and there would be rebuttal evidence, I
14 think I heard you say you might have an expert. That would
15 raise the question again of timing of disclosure. So if that's
16 something -- I just say we should resolve this so that it
17 permits time for expert disclosure, if that's what is required.

18 MR. MELLIN: Your Honor, that disclosure's already
19 occurred.

01:52 20 THE COURT: Oh, it has? All to the good.

21 I think that's what I had for this morning.

22 MR. WEINREB: Well, I guess there's one other thing.
23 Mr. Bruck sent us a letter the other day asking for proffers as
24 to what government witnesses would be testifying about with
25 respect to lack of remorse -- or what evidence the government

1 intends to put on with respect to lack of remorse and what
2 evidence it intends to put on with respect to risk of
3 severe -- bodily harm to others as opposed to the victims, the
4 matter we argued about earlier.

5 The government, likewise, is in a position of not
6 knowing what many of the defense witnesses are going to say.
7 In particular, there are a number of the foreign witnesses who
8 are being brought over who we don't have the slightest idea of
9 what they're going to talk about. For example, there are four
01:53 10 of Zubeidat Tsarnaeva's sisters. We don't know whether they're
11 going to be talking about the defendant, we don't know if
12 they're going to be talking about the defendant's grandparents,
13 we don't know if they're all going to be saying different
14 things or if they're all going to be saying the same thing.
15 And so we have no way in advance of seeking to challenge their
16 testimony, if that's an appropriate thing to do. They also
17 noticed any number of domestic witnesses where we don't know
18 what they intend to seek from these witnesses.

19 I think that both sides are entitled to some kind of
01:54 20 notice of where the other -- where it's not self-evident, what
21 witnesses intend to say. And I would ask that that be part of
22 the disclosures that are required to be made along with the
23 witness list and the exhibit list themselves. They don't
24 necessarily need to be made to the Court unless the Court wants
25 them. I think they can be exchanged between the parties. They

1 don't obviously need to be scripts of what every witness is
2 going to say, but I think that, you know, as experienced
3 counsel, we have some sense of how to give the other side
4 enough notice to potentially object if an objection is
5 warranted.

6 MR. BRUCK: With respect to the -- I mean, this is the
7 first time we've been -- had a request or demand from the
8 government for summaries of each of our lay witness's
9 testimony, and I don't know that we're in a position to do that
01:55 10 on top of everything else that we're faced with in the next few
11 days. I specifically -- we specifically requested
12 specification of the so-called no-remorse, or lacks-remorse
13 evidence, because this is evidence which potentially -- not
14 necessarily, but potentially has great Fifth Amendment
15 significance and can involve a whole rats' nest of very, very
16 difficult constitutional issues. And we had to know ahead of
17 time whether this is the sort of evidence that they intend to
18 offer on the issue of remorse or whether or not this -- they
19 have some relatively unproblematic evidence.

01:56 20 So there was a particularized reason for wanting to
21 know what that evidence was, and we're going to have a problem
22 if we -- it's going to be rather hard to sort out if we don't
23 get some advance notice.

24 So that was -- I think there's a special reason that
25 it's really essential for the government to say what evidence

1 they intend to present on the question -- and what exhibits on
2 the question of failure to demonstrate remorse. Obviously, a
3 defendant who fails to demonstrate remorse after being charged
4 and in the face of accusation is likely exercising his Fifth
5 Amendment right against self-incrimination, and that can never
6 be used against him at sentencing, at guilt. And that's the
7 core of the constitutional problem that caused us to ask for
8 the government's evidence and exhibits on that issue. And we
9 still need it.

01:57 10 We've also got a few other issues that aren't ready to
11 be resolved but I wanted to flag for the Court.

12 THE COURT: Well, let's just stay on this for a
13 minute. I do think just from a trial management point of view
14 it would be helpful to the jury and others for the parties to
15 be well prepared for the examinations and not to have to react
16 on the spot, which may require some interruptions and perhaps
17 delays and so on, which I would like to try to avoid.

18 So it would seem to me it could be mutually beneficial
19 and aid that interest as well if the parties could indicate
01:57 20 relatively briefly the subject matter and substance of what the
21 witnesses will be talking about, just to give some notice to
22 each other as to what to prepare for from witnesses who might
23 otherwise be undefined, I guess is one way of putting it. And,
24 you know, I'm not talking about a couple of paragraphs; I mean,
25 a couple of sentences or something like that that could

1 accompany the witness list would be very helpful. It would be
2 helpful to me to see that as well. So it could be one list, I
3 guess, for each side.

4 You had some other --

5 MR. BRUCK: Yes, very briefly. We have filed and
6 furnished to the Court a suggested instruction for tomorrow
7 about avoiding the marathon. I'm sure the Court has its own
8 that --

9 THE COURT: I was going to mention that. I mean,
01:58 10 tomorrow really is going to be relatively brief. It is simply
11 to impress on the jury the importance of their being faithful
12 to their responsibilities over the next week. And I saw it. I
13 haven't read it yet. I haven't prepared my own yet, but I
14 will. If the government has something, I'll be happy to
15 receive that as well. But I expect to really just touch on
16 what we know now about the scheduling going forward once the
17 case resumes, and then, again, as I say, just continuing to
18 impress on them the responsibility that they have an as active
19 jury. So I expect it will take 15 minutes at the most, if
01:59 20 that.

21 MR. BRUCK: We have also filed -- requested
22 supplemental preliminary instructions on two issues, victim
23 impact and non-discrimination certificate, which we are asking
24 that the Court incorporate into your preliminary instructions
25 next Tuesday.

1 There are a number of issues that we wanted to flag.
2 We've been advised that the government intends to repeat the
3 exhibition of Martin Richard's clothing in open court, and
4 that's all we know about what they were going to do. We object
5 to it. We, on reflection, think we should have objected to the
6 display of the clothing, or the admission of the clothing when
7 it came in at the guilt phase. We found that to be an
8 extremely inflammatory part of the presentation of evidence
9 without corresponding -- or without sufficient corresponding
02:00 10 probative value. We don't see any need to be waving the boy's
11 clothes around anymore. And we wanted to put that on the
12 record. Maybe the government isn't going to do it, but we were
13 told it was.

14 We've been notified the government intends to use an
15 elegy to Lingzi Lu given by her father. For the most part we
16 do not object to that but think it should be given in a written
17 form rather than a videotape of a massive memorial service
18 conducted at Boston University, which is the form in which it
19 was given to us, and we also intend to discuss with the
02:01 20 government a few proposed redactions.

21 We received by email yesterday some extremely gruesome
22 photographs of injuries to the victim Mark Fucarile. And the
23 government hasn't yet told us whether they were simply
24 furnishing those to us or whether they intend to offer them,
25 but that's a potential problem that will have to be resolved if

1 the government wants to introduce those.

2 Last week the government furnished us with
3 X-ray -- with two medical articles including X-ray photographs
4 of metal objects lodged in the bodies of victims. We had never
5 seen any of these before. We don't think they're relevant to
6 any statutory aggravating factor. We made copies to pass up to
7 the Court.

8 Again, since we don't actually know what the
9 government intends to offer, it's perhaps premature, but we
02:02 10 think it would be wise to flag these issues now rather than be
11 surprised at the last minute. So when we're done, I would like
12 to pass these articles that we were furnished last week to the
13 Court --

14 THE COURT: All right.

15 MR. BRUCK: -- so that the Court will have some basis
16 if the issue arises.

17 I've mentioned the issue of lack of remorse and I
18 think -- if you'd bear with me.

19 (Counsel confer off the record.)

02:02 20 MR. BRUCK: Oh, yes. The government suggested, but
21 I'm not sure entirely made, an objection to videotaped remote
22 testimony from witnesses.

23 MS. CLARKE: Not taped.

24 MR. BRUCK: I'm sorry. Not taped. Video testimony --
25 a live video link to witnesses in Kazakhstan and Kyrgyzstan and

1 possibly Turkey who cannot travel for one reason or the other
2 to the United States. I don't know, again, whether this is a
3 live issue or whether the government has now come around to the
4 view that that is proper. But if it is a live issue, we're
5 going to need to resolve it before we go through the, you know,
6 very elaborate preparations that have to be made to actually
7 secure this remote live testimony from our witnesses overseas.

8 And I think that is everything we see on the horizon
9 at this time.

02:03 10 MR. CHAKRAVARTY: On that last point, Mr. Bruck raised
11 it because I was going to before. We can't make decisions on
12 whether we can agree to that until we know who they are and
13 what they're going to say, and I assume that Thursday we'll get
14 better visibility of that. But attendant to that is the
15 logistics, what is the proposed logistics kind of solution that
16 the defense is offering to make their witnesses available.

17 We don't want to make categorical statements unless we
18 know what the context is, what the type of testimony is that
19 the witness is going to offer, whether it will be controversial
02:04 20 and whether it will be cumulative, and whether the very grave
21 concerns that the government has about remote testimony from
22 somebody who's not going to be subject to perjury
23 accountability, somebody who's not going to have the other
24 indicia of a liability that you have in court, to be able to
25 weigh that process.

1 So we ask on Thursday if they could also provide that
2 type of information, and that would be useful.

3 THE COURT: I would agree and add to it for this
4 special category of witness, perhaps much greater detail would
5 have to be supplied so that trade-offs could be evaluated. Not
6 only who they are but what the substance would be.

7 MR. FICK: And we're --

8 THE COURT: Frankly, I have an institutional concern
9 about the absence of an oath -- an enforceable oath. I'll just
02:05 10 tell you that. It could be -- it could perhaps be overridden
11 by safeguard conditions, but I'd like to -- so I'd like to know
12 rather specifically what you propose, and that also will relate
13 to the probative value and the --

14 MR. FICK: There's a bit of a moving-part element to
15 it as well because there's a question of -- a couple of these
16 people, we hope they might get parole, but the government has
17 indicated they're still in review, so that's sort of a
18 question.

19 THE COURT: Right.

02:05 20 MR. CHAKRAVARTY: Your Honor, one other point. First,
21 a simple explanation for Mr. Bruck's exhibit that he's going to
22 show to the Court. There is some medical review kind of
23 journal articles which depict images of various scans, MRI, CAT
24 scans, PET scans. Some of those involve some of our victims
25 who are going to be testifying, and it goes to the grave risk

1 of death to those particular victims. It's not the article
2 that would be offered; it would simply be the images. So
3 that's the explanation for that.

4 One other point which I hesitate to raise simply
5 because it seems so trivial, but it's been raised a few times
6 by Mr. Bruck, with regard to the sense of a
7 nondiscrimination -- the closing, and in particular, a nasheed
8 that was played. Before the government's closing, we provided
9 a list of exhibits that the government would be using. The
02:06 10 defense, of course, made no objection. I want to make that
11 clear for the record.

12 The second point is there were files in evidence
13 before the closing that came in without particularized
14 objection by the defense that depict both that nasheed, which
15 was a nasheed which was converted into an MP3 audio file from a
16 video. That video file, which is the nasheed playing over
17 jihadi images, subtitled further as "Ghuraba,"
18 suggesting -- explicitly saying that the people who this video
19 was produced by and for were different than others.

02:07 20 These were not necessarily religious connotations;
21 these were terrorist connotations. And the evidence in this
22 case is replete with motivation for terrorism and terrorism
23 connotations. There is no intention -- and certainly if the
24 evidence points towards a particular ethnic group or religious
25 group that has -- that's because that's where the evidence

1 points, not because that's an argument the government is making
2 nor is it trying to inflame the passions of the jury on that
3 point. We haven't thus far; we won't going forward.

4 It seems to be the defense has -- as I say, its past
5 prologue has teed that up as a theme they want to convey in the
6 penalty phase. And it's equally inappropriate in the penalty
7 phase for the defense to be arguing that our theory of
8 prosecution is somehow implicating the defendant because he is
9 an immigrant or because of his national origin or his religion,
02:08 10 just as it would be if we were to do it.

11 MR. MELLIN: Your Honor, if I could respond to
12 Mr. Bruck's concern about Martin Richard's clothing. We do
13 intend in the closing in the death penalty phase to show the
14 jury this clothing. It goes to two of the aggravating factors
15 in this case: one, the vulnerability of Martin Richard, how
16 little he was, how short he was, where the tearing would occur;
17 secondly, it goes to the cruel, heinous nature of it, how his
18 clothing is ripped apart, how his shorts are essentially
19 burned. That is direct evidence of two of the important
02:08 20 aggravating factors.

21 THE COURT: All right.

22 MR. BRUCK: Very briefly with respect to the last
23 point by Mr. Chakravarty, we have been attempting to secure
24 from the government a -- so that we can make it part of the
25 record, the actual video clip that was played. We think that

1 rather than argue about what it meant, the record should
2 clearly include the material itself. So if the government
3 would help us with that, we would be --

4 THE COURT: Yes, we talked about that at the time.

5 MR. CHAKRAVARTY: Right. And we provided that to the
6 Court, and at the Court's direction I can make a copy
7 for the --

8 THE COURT: Oh, I see. Fine. Yes.

9 MR. CHAKRAVARTY: And for the record, the video file
02:09 10 which the government just alluded to, again, is, I think,
11 1143-88.

12 THE COURT: Okay. All right. Very good. We'll see
13 you tomorrow morning.

14 THE CLERK: All rise for the Court. Court will be in
15 recess.

16 (The Court exits the courtroom and the proceedings
17 adjourned at 12:05 p.m.)

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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

Date: 4/16/15